

BEFORE THE  
POLLUTION CONTROL HEARINGS BOARD  
STATE OF WASHINGTON

IN THE MATTER OF  
CDR Construction, Inc.

Appellant,

v.

PUGET SOUND AIR POLLUTION  
CONTROL AGENCY,

Respondent.

PCHB NO. 86-162

FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND  
ORDER

This matter is an appeal from a Notice of Violation and Civil Penalty of \$1,000 for emission of smoke and flyash from a landclearing operation, allegedly in violation of Puget Sound Air Pollution Control Agency ("PSAPCA") Regulation I, Section 9.11(a). A formal hearing was held on November 21, 1986 before Board Members Judith A. Bendor, Presiding, Lawrence J. Faulk, Chairman and Wick Dufford, Member. Respondent agency elected a formal hearing pursuant to RCW 43.21B.230. The hearing was officially reported by Gene Barker and Associates.

1 Appellant CDR Construction, Inc. appeared and was represented by  
2 Russell Sybertz, project manager. Respondent public agency PSAPCA  
3 appeared and was represented by its attorney, Keith D. McGoffin.

4 Witnesses were sworn and testified. Exhibits were admitted and  
5 have been examined.

6 From the testimony heard and exhibits examined, the Board makes  
7 these:

8 FINDINGS OF FACT

9 I

10 Respondent PSAPCA is an activated air pollution control authority  
11 under terms of the state's Clean Air Act, empowered to monitor and  
12 enforce outdoor burning in a five-county area of mid-Puget Sound.

13 The agency, pursuant to RCW 43.21B.260, filed with this Board a  
14 certified copy of its Regulation I (and all amendments thereto), of  
15 which the Board takes notice.

16 II

17 CDR Construction, Inc. is a company located in Gig Harbor, hired  
18 by the property owner to clear vegetation from land located at 140th  
19 Avenue S.E. and S.E. 182nd Street in Renton, Washington.

20 III

21 On July 8, 1986, a citizen residing at 18112 145th S.E. in Renton,  
22 ("complainant") called PSAPCA and complained about smoke from a  
23 landclearing fire which affected him at his residence. On July 9,  
24 1986 in the morning, a PSAPCA inspector received a copy of this  
25

1 complaint and a telephone call from the Assistant Fire Chief for King  
2 County Fire District No. 40 (Spring Glen). The Assistant Chief stated  
3 he had received a number of complaints about a landclearing fire  
4 located near 140th Avenue S.E. and S.E. 182nd Street ("fire site").

5 IV

6 That afternoon, at approximately 3:30 p.m., the PSAPCA inspector  
7 and the Fire Chief and Assistant Fire Chief for District No. 40 went  
8 to the complainant's home. There the inspector observed distinct  
9 smoke traveling about 500 feet from the landclearing fire site to the  
10 residence. The odor at the front door of the home was definite and  
11 distinct.

12 V

13 Two neighbors joined the group. The complainant asked that the  
14 fire be extinguished, saying it had been burning since July 3. The  
15 Fire Department explained that its rules did not provide for  
16 extinguishment absent a danger of the fire's spreading. The inspector  
17 explained PSAPCA enforcement proceedings, including possible civil  
18 penalties.

19 VI

20 The inspector stood in the complainant's front yard for  
21 approximately 20 minutes, from about 3:55 p.m. until 4:15 p.m. He  
22 rated the fire's odor at level 2, using the following scale:

23 0--No detectable odor  
24  
25

1 1--Odor barely detectable

2 2--Odor distinct and definite, any unpleasant characteristics  
3 recognizable

4 3--Odor strong enough to cause attempts at avoidance

5 4--Odor overpowering, intolerable for any appreciable time.

6 This rating scale is used by PSAPCA not as a regulatory standard, but  
7 as a shorthand method for preserving impressions for evidentiary  
8 purposes.

9 The complainant completed a form in which he stated that the smoke  
10 severely affected his allergy and it and the flyash permeated his  
11 house and saturated his drapes, carpets, etc.

12 VII

13 The inspector drove to the landclearing fire where he contacted  
14 the site foreman for CDR Construction, Inc. The inspector advised the  
15 foreman that a Notice of Violation would be sent to his company and  
16 the property owner. Notice of Violation No. 021298 was sent via  
17 certified mail on July 10, 1986. A Notice and Order of Civil Penalty  
18 No. 6485 for \$1,000 for allegedly violating Regulation I, Section  
19 9.11(a) was sent on August 12, 1987.

20 VIII

21 Feeling aggrieved by this action, appellant appealed to this Board  
22 on September 11, 1986. At the hearing, appellant CDR did not question  
23 legal liability. Appellant did contest the amount of the penalty,  
24 believing it to be excessive.

25  
26 FINAL FINDINGS OF FACT,  
27 CONCLUSIONS OF LAW AND ORDER  
PCHB NO. 86-162

IX

PSAPCA allows landclearing burning within areas where the population density within .6 of a mile from the proposed burn site is less than 2,500 persons. Prior to the burning in question, the agency had issued a verification that the proposed site was in such an area. The verification document, however, explicitly stated that it is unlawful for such burning to cause injury or unreasonable interference with life and property.

X

Appellant stated that in the year he has worked for CDR, it had not received any penalties from PSAPCA. He further stated that CDR had worked cooperatively with the neighbors. Restitution has been paid to one pool owner. The fire had been stopped twice before July 9, 1986 due to the neighbors' complaints. On July 9, 1986, the winds had shifted, sending the smoke into the neighbors' homes. Appellant further stated that CDR had tried to diminish that smoke by stacking the vegetation and making the fire hotter. CDR conceded it had not tried, even after receiving complaints, to clear the land by a method other than open burning.

XI

Any Conclusion of Law hereinafter determined to be a Finding of Fact is hereby adopted as such.

From these Facts, the Board comes to these

FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER  
PCHB NO. 86-162

1 CONCLUSIONS OF LAW

2 I

3 The Board has jurisdiction over these persons and these matters.  
4 Chapters 70.94 and 43.21B RCW. The case arises under regulations  
5 implementing the Washington Clean Air Act, Chapter 70.94 RCW.

6 II

7 The Legislature of the State of Washington has enacted the  
8 following policy on outdoor fires:

9 It is the policy of the state to achieve and maintain high  
10 levels of air quality and to this end to minimize to the  
11 greatest extent reasonably possible the burning of outdoor  
12 fires. Consistent with this policy, the legislature  
declares that such fires should be allowed only on a  
limited basis under strict regulation and close control.  
RCW 70.94.740.

13 III

14 Under terms of Section 9.11(a) of PSAPCA Regulation, certain air  
15 emissions are prohibited:

16 (a) It shall be unlawful for any person to cause or allow  
17 the emission of any air contaminant in sufficient  
18 quantities and of such characteristics and duration as is,  
or is likely to be, injurious to human health, plant or  
animal life, or property, or which unreasonably interferes  
with enjoyment of life and property.

19  
20 This formulation parallels the definition of "air pollution" contained  
21 in the State Clean Air Act at RCW 70.94.030(2). The language is  
22 similar to the traditional definition of a nuisance. See RCW 7.48.010.

1 IV

2 On July 9, 1986, odors, smoke and flyash emanating from a  
3 landclearing fire caused and allowed by appellant, traveled onto a  
4 nearby resident's property so as to unreasonably interfere with that  
5 person's enjoyment of life and property, in violation PSAPCA  
6 Regulation I, Section 9.11(a).

7 V

8 Appellant is in a business which routinely engages in landclearing  
9 by burning. The company should be aware of the limitations on its  
10 conduct. Even landclearing burning, where otherwise allowed, RCW  
11 70.94.750(2), must not cause the adverse effects forbidden by  
12 Regulation I, Section 9.11(a).

13 VI

14 Numerous complaints had been received by PSAPCA and the Fire  
15 Department about this multi-day landclearing fire. The burning  
16 occurred over many days and had already been stopped at least twice by  
17 appellant because of excess emissions. The appellant did not attempt  
18 to dispose of the vegetation by alternative methods. See RCW  
19 70.94.745. Clearly the requirements of RCW 70.94.740, to maintain  
20 high air quality and to minimize outdoor burnings, also were not met.

21 VII

22 PSAPCA's Regulation I and the Washington State Clean Air Act  
23 provide for a maximum civil penalty of \$1,000 per day in occurrences  
24

1 of this kind. The purpose of the civil penalty is not primarily  
2 punitive, but rather to influence behavior. Considering all the facts  
3 and given the need to promote compliance among members of the public,  
4 a \$1,000 monetary sanction is supported in this case.

5 We believe that upholding the penalty will promote the law's  
6 deterrent purpose.

7 VIII

8 Any Finding of Fact hereinafter determined to be a Conclusion of  
9 Law is hereby adopted as such.

10 From these Conclusions, the Board makes this  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25




ORDER


Notice and Order of Civil Penalty No. 6485 is affirmed.

DONE this 23<sup>rd</sup> day of February, 1987.

POLLUTION CONTROL HEARINGS BOARD

  
JUDITH A. BENDOR, Member

 2/23/87  
LAWRENCE J. FAULK, Chairman

  
WICK DUFFORD, Member

FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER  
PCHB NO. 86-162